89-1718

No. 89-____

MAY 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,

*Petitioner*,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## APPENDIX

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## Appendix A

EXXON COMPANY, U.S.A., a DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Dec. 8, 1989.

Order Denying Rehearing Feb. 8, 1990.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

In a diversity action against a bank for refusing to honor a standby letter of credit, we held that the obligation of the issuing bank had terminated even though it might not have been possible for the holder of the letter to present the documents required for payment before the expiry date stated in the letter.[1] Thereafter, and before the issuance of our mandate, an intermediate state court of appeals rendered an unreported opinion interpreting the effect of such an impasse differently. On application for rehearing, we refused to consider this opinion as precedent. The state supreme court refused to authorize publication of the opinion, but the court of appeals did. Granting a writ, the Supreme Court

1 828 F.2d 1121 (5th Cir. 1987).

remanded the case to us for reconsideration in the light of the published opinion. Concluding that the case before us is indistinguishable from the later state court decision, we hold that under state law the letter of credit had not expired when presented to the issuer.

I.

This tale has two chapters. Chapter I consists of the operative historical facts developed in the proceedings below. These are fully set forth in our first opinion, *Exxon I*[2] rendered on October 8, 1987. Chapter II is the extensive litigation history. On November 17, the Amarillo, Texas, Court of Appeals, rendered an unreported opinion in *Kerr Construction Co. v. Plains National Bank* that arguably indicated that a Texas court might reach a different result from that which we reached in *Exxon I*. The Texas Supreme Court denied a writ of review. Exxon sought rehearing, asking us to consider and follow *Kerr*, but, in *Exxon II*, we refused because under Texas law an unreported opinion is not precedential.[3] Exxon then applied to the Supreme Court for a writ. While the application was pending, the Texas Supreme Court denied a motion to publish *Kerr*, but the Amarillo Court of Appeals granted a similar motion, with the result that the opinion is now reported.[4]

The Supreme Court thereafter vacated our judgment and, in *Exxon III*, remanded the case "for further consideration in light of" *Kerr*.[5] Somewhat perplexed about the Texas Supreme Court's use of the term "writ denied," rather than "writ refused," in denying review of *Kerr* and considering the possibility that this phrase intimated that the *Kerr* opinion contained an error of law, we decided, in *Exxon IV*, to certify the question presented in this case to the Texas

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2 Id.

3 835 F.2d 1433 (5th Cir. 1987).

4 753 S.W.2d 181 (Tex.Ct.App. 1987).

5 _____ U.S. _____, 109 S.Ct. 299, 102 L.Ed.2d 319 (1988).

Supreme Court.[6] In *Exxon V*, after obtaining the parties' recommendations regarding the statement of the issue, we formulated the question as follows:

> When a bank issues an irrevocable standby letter of credit that (i) contains a certification provision providing for payment to a beneficiary upon presentation of a signed statement certifying that the bank's customer did not perform an underlying obligation "between September and December, 1981," but (ii) also contains, in a subsequent paragraph, a presentation clause stating that such certification must be made "not later than October 31, 1981," when does the obligation of the issuing bank to honor its letter of credit terminate under Texas law?[7]

In *Exxon VI*, the state supreme court ordered that the question be "declined without answer" because the question "was dependent upon issues of fact."[8] With such assistance as may be derived from this Delphic refusal, we attempt to follow the Supreme Court's mandate.

## II.

A federal court sitting in diversity is bound to follow decisions of the state's intermediate appellate courts unless it is "convinced by other persuasive data that the highest court of the state would decide otherwise."[9] There is, therefore, a working presumption that state intermediate appellate court decisions represent accurate statements of state law.

The Bank of Paris (Paribas) contends that *Kerr* misstates Texas law, resting its argument upon three interdependent contentions. First, the state supreme court's denial of writs in *Kerr* intimates that the appellate court's legal analysis was

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6 867 F.2d 1524 (5th Cir. 1989).

7 874 F.2d 234, 236 (5th Cir. 1989).

8 No. C-8684 (Tex. Sept. 20, 1989).

9 *West v. AT&T*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

deficient in one or more respects. This is so, Paribas argues, because the court's order denying the writ contained the phrase "writ denied," a phrase indicating that the court was "not satisfied that the opinion of the court of appeals in all respects has correctly declared the law."[10] Second, although the *Kerr* opinion was in fact belatedly published by order of the appellate court, the state supreme court has refused to order its publication. According to Paribas, the state supreme court's steadfast refusal to publish *Kerr* suggests that the court considered it "unworthy" to be precedential. As Paribas correctly notes, under Texas law the state supreme court may decline to publish lower court opinions, and unpublished opinions have no precedential value.[11] Third, the *Kerr* decision is inconsistent with several state supreme court decisions concerning letters of credit.

These contentions fail to convince us that the Texas Supreme Court thinks *Kerr* is wrong. As we noted in *Exxon IV*, the first certification opinion, the implications of the state supreme court's "denial" of writs in *Kerr* are not clear.[12] The authorities cited do not persuade us that the court currently uses the notation "writ denied" only when it is dissatisfied with the appellate court's statement of the law. The Texas Supreme Court apparently uses this phrase also in those cases in which, for one reason or another, it chooses not to grant review.

Even if, however, we should conclude that the state supreme court was not "satisfied" that the Amarillo appellate court had correctly stated the law "in all respects" in its *Kerr* opinion, it is not clear what we should make of the court's dissatisfaction. That the supreme court was not "satisfied" might mean merely that it could not determine, without further study of the case, whether the lower court had in fact correctly stated the law.

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10 Tex.R.App.P. 133(a) (West 1989).

11 Tex.R.App.P. 90(i) (West 1989).

12 867 F.2d 1524 (5th Cir. 1989).

The implications of the state supreme court's refusal to order publication of the appellate court opinion are even more indeterminate than are the implications of that court's "denial" of writs. Further, although Paribas argues that *Kerr* is incompatible with several cited Texas Supreme Court cases,[13] these cases bear only tangentially on the issue raised in *Kerr*. Indeed, that issue truly seems to have been res nova.

The reasons that the Texas Supreme Court gave for refusing to accept certification of the question that we posed to it lends further support to the conclusion that *Kerr* is not to be disregarded. Were *Kerr* not authoritative, the resolution of this case would not turn solely upon "issues of fact."

For these reasons, we conclude that *Kerr* is binding on this court under the *Erie* rule.

## III.

Paribas also argues that even if *Kerr* is authoritative, there are significant differences between the facts in *Exxon* and those in *Kerr*. Certainly there are differences, but as every lawyer learns in his first semester of law school, precedential impact does not depend upon finding an identical, or to use the vernacular a "goose" or a "red pony," case.

With this in mind, we analyze the facts in *Kerr*. Cary Johnson, a subdivision developer, pursuant to an agreement with Kerr Construction, his paving contractor, obtained a letter of credit from Plains National Bank in favor of the City of Lubbock. The first paragraph of the letter authorized Lubbock to draw on the bank for Johnson's account if Kerr should "default[ ] or fail[ ] within ten (10) months to complete the paving improvements." Because the letter was issued on 9/17/84, this ten-month period would expire on 7/17/85. The last paragraph of the letter, however, indicated

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13 *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987); *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987); *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1979).

that the letter would expire on 1/1/85, although the letter further provided that the expiration date would automatically be extended for six months unless the bank notified the beneficiary otherwise. Because the bank did not give the beneficiary such notice, the final expiration date became 7/1/85. Later, Kerr Construction defaulted. Lubbock's effort to draw on the bank, which was made on 7/17/85, was rejected by the bank on the ground that the letter had expired on 7/1/85.

On appeal, the Amarillo Court of Appeals described the "single issue" before it in these terms: what was "the due date of the letter of credit." The court began its analysis of the problem by observing that the first and last paragraphs of the letter were in "irreconcilable conflict." Although the court did not explain the nature of this "conflict," it is not difficult to reconstruct what the court was intimating. The first paragraph made the bank's liability contingent on Lubbock's certification that Kerr had failed to complete its work by 7/17/89. Lubbock, of course, could not make this certification until this date had passed. The last paragraph, however, indicated that the bank's exposure was to end by 7/1/89. Thus, if both paragraphs were given effect, the bank could never become liable, something the parties presumably could not have intended.

Having established the existence of the irreconcilable conflict, the court then set about determining which provision should control. For this purpose, the court resorted to certain basic maxims designed to aid courts in construing contracts in general. First, the court noted the rule that when there is an irreconcilable conflict between different provisions of an instrument, the first should be given effect. Application of this rule to the facts of *Kerr*, the court concluded, would lead to the enforcement of the first paragraph. Second, the court cited the rule that, when different provisions of an agreement are in irreconcilable conflict, the provision that "contributes most essentially to the agreement is entitled to the most consideration." According to the court, the first paragraph, because it "state[d] the condition precedent to the Bank's liability," was the more essential and significant provision of the letter. For these reasons, the court concluded that the

first paragraph controlled over the last and, therefore, that the bank remained liable under the letter at least through 7/17/85.

Several aspects of the *Kerr* decision are of particular significance. First, the court characterized the problem before it as one of contractual construction, a problem brought on by the presence in the agreement of mutually incompatible provisions concerning the time of performance. Second, and more important, the court resolved its interpretive problem by applying several stock rules for the construction of contracts. Absent from the opinion is any discussion of the policies implicated by the alternative constructions of the contract, for example, the need of banks and other commercial lenders for fixed and certain expiration dates in standby letters of credit and other similar security instruments. Accordingly, there is no indication whatsoever that the appellate court concluded, as a matter of policy, that the interests of financial markets would be better served by placing the risk of ambiguity in letters of credit upon the issuers rather than upon the beneficiaries. Accordingly we too must resist the view of sound commercial policy on which we relied in part in *Exxon I*.

Reading *Kerr* in this fashion, we conclude that, contrary to what we may have said in *Exxon I*, this case does present a problem of general contractual construction rather than the narrower problem of construing a specific kind of security instrument. The provision in the letter fixing the timing of Exxon's certification of default by Houston (documents "certifying that Houston . . . has failed to deliver . . . between September and December") and the provision fixing the expiration date (October 31, 1981) are in "irreconcilable conflict," as that phrase was used by the *Kerr* court. As the *Kerr* decision makes clear, the distinctive aspects of letters of credit are of themselves irrelevant to deciding which provision of the letter should be given controlling effect. Any conflict in the terms of such an instrument must, instead, be resolved by resorting to standard maxims of contractual construction. In the letter of credit at issue here, the provision setting forth the expiration date follows the provision establishing the time

for certification of default. Further, the certification provision, because it states a condition precedent to the bank's liability, is more "essential" to the contract as a whole than is the expiration provision. The interpretive maxims applied in *Kerr*, therefore, compel the conclusion that the date fixed in the certification provision controls over the expiration date.

The distinctions that Paribas attempts to draw between the facts of *Kerr* and those of this case do not mandate a different conclusion. According to *Kerr*, resolving ambiguities in a letter of credit is a matter of contractual construction. It follows, then, that unless any of the distinctive facts of this case implicate maxims of construction that were not implicated in *Kerr* and that would compel a different interpretation of Paribas' letter of credit, any differences between *Kerr* and this case are of no consequence to the question of how the ambiguity in that letter of credit should be resolved. Paribas has not brought any such maxim of construction to our attention, and we have been unable to think of one.

Although the distinctive facts of this case do not, therefore, have any significant bearing on the issue of contractual construction, they do, at least at first blush, seem to have some bearing on the quite different issue of equitable estoppel, an issue not presented in *Kerr*. Immediately upon issuance of the letter, Exxon realized that there was a problem with the expiration date. Indeed, Exxon later tried to cover itself by twice asking Houston to obtain an extension of that date. At no time, however, did Exxon contact Paribas to clear up the ambiguity. Paribas, faced with Exxon's silence and taking the expiration date at face value, decided to release its security when that date passed.

Although these facts may evoke sympathy for Paribas' position, they are insufficient to establish a claim of estoppel against Exxon. Under Texas law, one of the essential elements of the defense of estoppel is "reasonable or justified reliance" on the statements, silence, or conduct of the person

to be estopped.[14] Paribas had no knowledge of any of Exxon's potentially misleading statements or actions, for example, its efforts to have Houston change the expiration date; consequently, Paribas cannot claim that it relied on those statements or actions. Although Paribas can tenably claim that it relied upon Exxon's silence, rather than Exxon's actions, its reliance in this regard was not reasonable. Paribas' reliance on Exxon's silence could be considered reasonable only if it were established that, as a matter of law or of commercial practice, beneficiaries like Exxon have the primary responsibility for identifying and avoiding ambiguities in letters of credit as well as for initiating negotiations to eliminate them.[15] Absent some such rule placing the risks associated with ambiguities on one party or the other, the parties to an ambiguous letter of credit are in the same position as are parties to any other ambiguous contract: neither can assume from the other's silence that the other has tacitly acquiesced in the construction of the contract that favors him. *Kerr* informs us that Texas law does not, as a general rule, place the risks associated with ambiguity on the beneficiary.

For these reasons, we AFFIRM the judgment of the district court.

## ORDER

Construing Exxon's Motion to Remand for Attorney's Fees as a petition for rehearing, it is DENIED. The motion is untimely. See Fed.R.App.Proc. 40.

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14 *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 317 (Tex. Ct.App. 1985); *see also Traylor v. Gray*, 547 S.W.2d 644, 653 (Tex.Civ.App. 1977); *Clifton v. Ogle*, 526 S.W.2d 596, 603 (Tex.Civ.App. 1975).

15 *See generally Clifton*, 526 S.W.2d at 602 (reliance on silence may be justified if the silent party has a "duty to speak").

**Appendix B**

IN THE SUPREME COURT OF TEXAS

NO. C-8684

| | | |
|---|---|---|
| EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION | § | |
| v. | § | U.S. CERTIFIED QUESTION |
| BANQUE de PARIS ET DES PAYS-BAS | § | |

ORDER

The following question was certified to the Supreme Court of Texas by the United States Court of Appeals for the Fifth Circuit from an appeal styled *Exxon Company U.S.A., a Division of Exxon Corporation v. Banque de Paris et des Pays-Bas*, 874 F.2d 234, 236:

> When a bank issues an irrevocable standby letter of credit that (i) contains a certification provision providing for payment to a beneficiary upon presentation of a signed statement certifying that the bank's customer did not perform an underlying obligation "between September and December, 1981," but (ii) also contains, in a subsequent paragraph, a presentation clause stating that such certification must be made "not later than October 31 , 1981," when does the obligation of the issuing bank to honor its letter of credit terminate under Texas law?

Because it is the opinion of this court that the question certified is dependent upon issues of fact, a majority of the court hereby exercises its discretion to respectfully decline to accept the question. Tex. R. App. P. 114.

It is therefore ordered that the question be declined without answer, and the record returned to the United States Court of Appeals for the Fifth Circuit.

ORDER DELIVERED: September 20, 1989

## Appendix C

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

May 16, 1989.

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

### CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF TEXAS, PURSUANT TO TEXAS CONSTITUTION ART. 5 § 3-c, and TEX.R.APP.P.114

TO THE SUPREME COURT OF TEXAS AND THE HONORABLE JUSTICES THEREOF:

1. STYLE OF THE CASE.

The style of the case in which this certificate is made is *Exxon Company, U.S.A., a division of Exxon Corporation, Plaintiff/Appellee/Cross-Appellant v. Banque de Paris et des Pays-Bas, Defendant/Appellant/Cross-Appellee*, Case No. 87-2007, in the United States Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Southern District of Texas. The United States Supreme Court vacated the judgment of the Fifth Circuit Court of

Appeals rendered after an earlier hearing,[1] and remanded the case,[2] directing us to consider the decision of the Texas Court of Appeals in *Kerr Construction Co. v. Plains National Bank*.[3]

2. STATEMENT OF THE CASE.

In July, 1981, Exxon Company, U.S.A. entered into an oil exchange contract with Houston Oil & Refining, Inc. under which Exxon was to deliver 558,000 barrels of crude oil to Houston during July, 1981. The agreement required Houston to deliver an equal quantity of crude oil to Exxon during the period from September through December, 1981. The contract also required Houston to provide an irrevocable standby letter of credit. According to the contract, the letter of credit was to be payable to Exxon upon presentation of invoices or a statement by an officer of Exxon certifying that invoices were unpaid and ten or more days past due. See Appendix A.

Thereafter, Houston applied to Banque de Paris et des Pays-Bas for a letter of credit in the amount of $19,530,000. Because the issuance of the letter of credit was in effect an extension of credit by the Bank to Houston, the Bank required Houston to provide security sufficient to cover the amount of credit and blocked certain funds coming into Houston's account.

On July 16, 1981, the Bank issued the letter of credit using the language that had been supplied by Houston with respect to the documentary provisions and the expiry date. The letter provided for payment of $19,530,000 to Exxon upon Exxon's submission, *inter alia*, of a "[s]tatement signed by an authorized representative [of Exxon] certifying that Houston . . . has failed to deliver to Exxon . . . 558,000 barrels of [crude oil] . . . between September and December, 1981." The letter further provided, in a subsequent clause, that this certificate "must be presented not later than October 31, 1981."

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1 828 F.2d 1121 (5th Cir. 1987).

2 _____ U.S. _____, 109 S.Ct. 299, 102 L.Ed.2d 319 (1988).

3 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied).

(Because October 31, 1981, was a Saturday, Exxon could also present the documents on the next business day, Monday, November 2, 1981). The letter also stated that it was subject to the 1974 revision of the Uniform Customs and Practice for Documentary Credits, a set of rules promulgated by the International Chamber of Commerce. See Appendix B.

In July, 1981, the Bank sent a copy of the letter of credit to the attention of Don Meiers, the Exxon employee responsible for receiving and transmitting letters of credit and monitoring their expiration dates. Meiers received the letter of credit and transmitted it to the appropriate executives at Exxon, accompanied by a letter stating that it is "due to expire October 31, 1981." Meiers' transmittal letter also noted that the credit covered the delivery of crude oil by Exxon during July and "the return" of the crude by Houston "between September and December 1981." See Appendix C. No one at Exxon commented to the Bank thereafter about the terms of the letter of credit.

During November, 1981, the Bank released both the security it had held for its extension of credit to Houston and the funds it had blocked in Houston's account.

In early November, 1981, Exxon learned that Houston would default on its obligation to make the delivery of crude oil required by the contract. On November 30, and again on December 1, 1981, Exxon presented its certification of Houston's non-delivery to the Bank. The Bank refused payment each time on the ground that the presentation was untimely.

Exxon brought this action against the Bank to recover on the letter of credit in the 234th Judicial District Court of Harris County, Texas. Invoking federal diversity jurisdiction, the Bank removed it to the United States District Court for the Southern District of Texas. After extensive discovery, both sides moved for summary judgment. The district court granted summary judgment for Exxon. On appeal, the United States Court of Appeals for the Fifth Circuit reversed and directed the entry of judgment for the Bank.[4] The

4 828 F.2d 1121 (5th Cir. 1987).

United States Supreme Court thereafter vacated that judgment and remanded the case to the Fifth Circuit for further consideration in the light of *Kerr Construction Co. v. Plains National Bank*,[5] which was published while the *Exxon* case was pending in the United States Supreme Court. Copies of the district court opinion, the original Fifth Circuit opinion, and the Supreme Court opinion are attached. Upon remand, a majority of the Fifth Circuit panel decided to certify the case to the Supreme Court of Texas, with Judge Reynaldo Garza dissenting from the need for certification. A copy of this opinion is also attached. Having decided to certify the controlling question of Texas law to the Texas Supreme Court, we will, of course, follow the decision of that court.

3. QUESTION CERTIFIED.

When a bank issues an irrevocable standby letter of credit that (i) contains a certification provision providing for payment to a beneficiary upon presentation of a signed statement certifying that the bank's customer did not perform an underlying obligation "between September and December, 1981," but (ii) also contains, in a subsequent paragraph, a presentation clause stating that such certification must be made "not later than October 31, 1981," when does the obligation of the issuing bank to honor its letter of credit terminate under Texas law?

We disclaim any intention or desire that the Supreme Court of the State of Texas confine its reply to the precise form or scope of the question certified.

5 753 S.W.2d 181 (Tex.App.—Amarillo 1987, *writ denied*).

APPENDIX A

EXXON COMPANY, U.S.A.
Post Office Box 2180—Houston Texas 77001

Supply Department
Commerce

Richard J. Kartzke
Raw Materials

July 9, 1981

Exxon Exchange Contract No. HR1-032

Houston Oil & Refining, Inc.
11221 Katy Freeway
Houston, Texas 77079

Attention: Mr. Ralph Carthae

Gentlemen:

This Contract, between Houston Oil & Refining, Inc. ("Houston Oil") and Exxon Company, U.S.A. (a division of Exxon Corporation) ("Exxon"), covers the exchange, for and in consideration of the agreements contained herein, of crude oil under the terms and conditions set forth.

Attached hereto as Exhibit A and made a part hereof are provisions specifying the terms and conditions of this exchange. The General Provisions on the reverse side hereof are made a part of this Contract.

Please return one fully executed copy of this Contract to the undersigned.

HOUSTON OIL & REFINING, INC.

By /s/ [Illegible]

VICE PRESIDENT
(Office or Title)

Date July 24, 1981

EXXON COMPANY, U.S.A.
(a division of Exxon Corporation)

By /s/ RICHARD J. KARTZKE
Richard J. Kartzke
Head—Raw Materials

Form Approved
By /s/

OCD:bp
Attachment

A division of Exxon Corporation

APPENDIX A—Continued

Houston Oil Contract No. 044-5250

Date July 9, 1981

EXHIBIT A
To Exchange Contract

1. TYPE OF CRUDE OIL AND QUANTITY:

   A. Houston Oil will deliver to Exxon approximately five hundred fifty-eight thousand (558,000) barrels of South Louisiana or West Texas Sour or Arab Light or Alaskan North Slope crude oils.

   B. Exxon will deliver to Houston Oil an equal amount of South Louisiana crude oil.

2. TERM:

   A. Exxon will deliver during July 1981.

      Houston Oil will deliver during September through December 1981.

3. DELIVERY AND TITLE:

   A. Houston Oil will deliver South Louisiana crude from Ship Shoal Pipeline facilities at St. James, Louisiana. Title and risk of loss will pass to Exxon as the crude enters recipient pipeline.

      Houston Oil will deliver West Texas Sour crude by pipeline into Shell Pipeline facilities at McCamey, Texas or into Exxon Pipeline facilities at Crane, Texas. Title and risk of loss will pass to Exxon as the crude enters said facilities.

      Houston Oil will deliver Arab Light and/or Alaskan North Slope by tanker into a mutually acceptable U.S. Gulf Coast port. Title and risk of loss will pass to Exxon as the crude passes the tanker's permanent hose connection at the point of discharge.

B. Exxon will deliver South Louisiana crude from Ship Shoal Pipeline facilities at St. James, Louisiana. Title and risk of loss will pass to Houston Oil as the crude enters recipient pipeline.

4. DIFFERENTIALS:

Barrel for barrel exchange. Houston Oil agrees to pay Exxon differentials on crude delivered to Exxon hereunder as follows:

| Crude | $/B |
|---|---|
| South Louisiana for South Louisiana | Even |
| South Louisiana for West Texas Sour | 0.99 |
| South Louisiana for Arab Light | 1.62 |
| South Louisiana for Alaskan North Slope | 2.36 |

Payment for differentials on volumes of crude delivered hereunder by pipeline will be made on the 20th day of the month following the month of delivery.

Payment for differentials on volumes of crude delivered hereunder by tanker will be made fifteen (15) days after discharge.

5. INDEPENDENT CARGO INSPECTION:

Exxon to arrange; cost to be shared equally.

6. IMPORTATION OF FOREIGN OIL:

Houston Oil will arrange and will pay import fees and duties on Arab Light delivered hereunder.

7. OTHER PROVISIONS:

Houston Oil will provide a $19,600,000 irrevocable letter of credit issued by a bank satisfactory to Exxon to cover value of crude delivered by Exxon hereunder. This letter of credit is payable to Exxon on presentation of invoices or statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more.

The Ocean Tanker Marine Provisions attached hereto are incorporated herein and made a part of this contract.

The parties hereto do not intend to create between them by this agreement a continuing obligation to buy, sell, or exchange crude oil other than as specified in the termination provisions contained elsewhere herein. Accordingly, the parties hereby mutually agree to the termination provisions contained elsewhere in this agreement, and each party hereby expressly waives any rights it may have under any existing or future state or federal government regulations to insist upon the continued supply of crude oil provided herein.

(Invoices and shipping/loading papers covering the oil delivered hereunder should be sent to Exxon Company, U.S.A., Supply Accounting, P.O. Box 2024, Houston, Texas 77001.)

APPENDIX B

Banque de Paris et des Pays-Bas
400 Park Avenue
New York, N. Y. 10022

EXXON COMPANY U.S.A.
800 BELL, ROOM 3593
HOUSTON, TEXAS 77001
ATTN: DON MEIERS

July 16, 1981

GENTLEMEN:

WE HEREBY OPEN OUR IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER 711828/FT, IN FAVOR OF YOURSELVES, BY ORDER AND FOR ACCOUNT OF HOUSTON OIL AND REFINING, INC., HOUSTON, TEXAS, AVAILABLE AT SIGHT, UP TO AN APPROXIMATE AMOUNT OF 19,530,000.00 USDLRS AGAINST:

1. COMMERCIAL INVOICE IN THREE COPIES COVERING APPROXIMATELY 18,000 BARRELS PER DAY OF SOUTH LOUISIANA LIGHT CRUDE OIL DELIVERED PIPELINE FACILITIES ST. JAMES, LA. DURING JULY, 1981.

2. COPIES OF PIPELINE TICKETS OR TRANSFER STATEMENT EVIDENCING DELIVERY AND/OR TRANSFER OF CRUDE OIL FROM EXXON COMPANY, U.S.A. TO HOUSTON OIL AND REFINING, INC.

3. STATEMENT SIGNED BY AN AUTHORIZED REPRESENTATIVE CERTIFYING THAT HOUSTON OIL AND REFINING, INC. HAS FAILED TO DELIVER TO EXXON COMPANY, U.S.A. 558,000 BARRELS OF ONE OF THE FOLLOWING: SOUTH LOUISIANA TO ST. JAMES, LA., WEST TEXAS SOUR TO SHELL, MCCAMEY OR EXXON, CRANE, ARAB LIGHT TO U.S. GULF COAST OR ALASKAN NORTH SLOPE TO U.S. GULF COAST BETWEEN SEPTEMBER AND DECEMBER, 1981.

SPECIAL CONDITIONS:

— PARTIAL DRAWINGS PROHIBITED.
— DRAWING PRIOR TO AUGUST 20, 1981 PROHIBITED.

DOCUMENTS MUST BE PRESENTED NOT LATER THAN OCTOBER 31, 1981.

WE HEREBY ENGAGE WITH THE BENEFICIARY THAT DOCUMENTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED UPON PRESENTATION AS SPECIFIED.

IN CONFIRMATION OF OUR TELEX OF TODAY'S DATE.

THIS CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1974 REVISION) INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NUMBER 290.

Yours faithfully,

/s/

BANQUE DE PARIS ET DES PAYS-BAS

APPENDIX C

EXXON COMPANY, U.S.A.
Post Office Box 2180 - Houston Texas 77001

Treasurer's Department

Dennis L. Doughty
Credit Manager

July 20, 1981

Letter of Credit
Houston Oil & Refining

Mr. D. P. Fraser

Houston Oil & Refining has provided an irrevocable bank letter of credit, No. 711828/FT as security for an exchange of crude oil under contract No. HR1-032. The letter of credit is drawn on the Banque de Paris et des Pays-Bas for $19,530,000 and is due to expire October 31, 1981. This letter of credit covers the delivery of 18,000 barrels/day of South Louisiana Light crude oil by Exxon during July and the return on these barrels by Houston Oil & Refining between September and December 1981.

The original of the letter of credit is being sent to you for safekeeping. Please sign below to indicate receipt and return to me in Suite 3763.

/s/
Donald H. Meiers

/s/
D.P. Fraser

DHM:mac
Attachment

c-w/attachment
Mr. O.C. Day
Mr. T.R. Reeves

## Appendix D

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE de PARIS et des PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

March 27, 1989.

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

On remand, the Supreme Court of the United States has directed us to consider *Kerr Construction Co. v. Plains National Bank*[1] and, taking that decision into account, to reconsider our prior opinion.[2] Because these cases raise an important issue of Texas state law left unsettled by *Kerr*, a case which may or may not control the outcome of *Exxon*, we, as a court exercising diversity jurisdiction, have decided to certify the decisive question in this case to the Supreme Court of Texas.

I.

In *Exxon*, we held that a bank's obligations under a letter of credit issued in good faith terminate on the date of expira-

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1 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied).

2 *Exxon Co. v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987).

tion specified in the letter even when that date precedes the date on which the underlying contract will be completed. The underlying contract in *Exxon* consisted of an agreement by Houston Oil & Refining to deliver to Exxon 558,000 barrels of crude oil "during September through December 1981." To guarantee its performance, Houston obtained a letter of credit from Banque de Paris payable upon Exxon's presentation of enumerated documents, including certification that Houston "has failed to deliver to Exxon . . . 558,000 barrels . . . between September and December, 1981." The letter of credit set October 31, 1981 as its expiry date. Exxon could have insisted on amendments to the letter if it found any provisions unacceptable, but it did not do so. The record reveals that all parties understood that the expiry date occurred before the end of the term in which Houston could satisfy its underlying contractual obligations to Exxon.

We determined that the letter of credit issued by Banque de Paris to Exxon contained no ambiguity; "[t]he expiry date in the letter of credit is as certain as words permit."[3] Because "[t]he length of time that an issuer remains liable for a failure to perform by its customer is . . . a matter of critical importance to the issuing bank, to the customer who must pay for the credit, and to the regulatory authorities," the "need for a precise expiration date is particularly acute when a standby letter of credit is issued."[4] We, therefore, held that the letter "required no construction and that it terminated on its express expiry date."[5]

As a federal court sitting only by virtue of diversity jurisdiction, we are bound to follow Texas law in this case. After we had decided *Exxon*, the Court of Appeals for the Seventh District of Texas published *Kerr*, a case addressing a "single issue": the "due date of [a] letter of credit."[6] The letter of credit at issue in *Kerr*, dated September 17, 1984, "autho-

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3 *Id.* at 1125.

4 *Ibid.*

5 *Id.* at 1126.

6 *Kerr*, 753 S.W.2d at 183.

rize[d]" its beneficiary "to draw" on the creditor bank if Kerr Construction "has defaulted or failed within ten (10) months to complete" its underlying contractual obligations. The letter of credit stipulated that it "shall be extended without amendment for an additional period of six (6) months from the expiration date hereof unless thirty (30) days prior to such expiration date" the bank elects not to renew it. The letter concluded: "[Y]our drafts . . . will be duly honored if presented to us on or before January 1, 1985 . . ."

The Texas intermediate appellate court found that "[t]he contract remained uncompleted on 17 July 1985, ten months after the date of the letter[,]" and that the "initial due date" of January 1 "was automatically extended until 1 July 1985."[7] In an opinion that initially remained unpublished, the court determined that "there is an irreconcilable conflict" between the "condition precedent to the Bank's liability"—the date of completion of the underlying contract, and the extended July 1 due date.[8] Because the court found the underlying contract "the most significant and essential provision in the [letter of credit] agreement,"[9] it held that the beneficiary of the letter of credit could draft against that letter until the date specified for performance of the underlying contract even though that date extended beyond the expiry date.

The Supreme Court of Texas denied Kerr's application for appeal with the notation "Writ Denied," and refused to publish the appellate court's opinion. The Seventh District Court subsequently published *Kerr*.

## II.

Before determining the applicability of *Kerr* to the facts presented in *Exxon*, we must first decide the status of the *Kerr* opinion as a correct exposition of Texas state law. The

7 *Ibid.*

8 *Id.* at 184.

9 *Ibid.*

parties differ with respect to the meaning this court should give to the *Kerr* opinion, considering the manner in which the Texas Supreme Court phrased its denial of writ in that case.

Under Rule 133 of the Texas Rules of Appellate Procedure, the State Supreme Court may decline to hear a case in one of two ways: the court may "refuse" the writ, connoting that the "judgment of the court of appeals is correct and . . . the principles of law declared in the opinion . . . are correctly determined;" alternatively, the court may state "Writ Denied" to convey that it

> is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction . . .[10]

By denying, rather than refusing, the writ in *Kerr*, the Texas Supreme Court may have intimated that the appellate court's opinion contained an error of law. If this was the effect of the Texas court action, we are unable to detect what uncorrected error, if any, lurked in the Seventh District's opinion, and we are, therefore, unable to embrace its legal reasoning and conclusions as a correct enunciation of the single issue of state law with which it dealt.

It is possible that the Texas Supreme Court may have declined to correct the mistake in *Kerr* because the appellate court's unpublished decision did not affect the jurisprudence of the state since, under state law,[11] unpublished state court opinions cannot be "cited as authority by counsel or by a court." The Texas Supreme Court refused to publish *Kerr*, and the state appellate court published its opinion only after the State Supreme Court had denied Kerr a writ. Thus, it is not clear whether or not the Texas Supreme Court would consider *Kerr* a proper elaboration of Texas law on letters of

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10 *See also* Texas Government Codes Ann. § 22.001(a)(6) (Vernon 1986).

11 Texas Rules of Appellate Procedure 90(i).

credit. Were it to be confronted with the issue raised in *Kerr* in a later case important to the jurisprudence of the state, the Texas Supreme Court might grant review and correct whatever error it saw in *Kerr*. It is precisely this review of the issue raised by *Kerr* and its resulting guidance that we, as a court sitting in diversity jurisdiction, require.

On the other hand, it is possible that, as Exxon contends, the Texas Supreme Court intimated no adverse implication by its use of the phrase, "Writ Denied," and that the phrase connoted simply a refusal to review the opinion.

Even if that is the case, however, and even if *Kerr* correctly states Texas law, its applicability to *Exxon* is not clear. The letter of credit in *Exxon* unambiguously prescribed an absolute expiration date; the letter in *Kerr* provided that the "expiration date . . . be [automatically] extended without amendment."[12] In *Exxon*, we found that the bank acted in good faith and fulfilled its obligations to all parties, that the beneficiary had opportunities to reform the letter of credit, and that each party knew that the expiration date preceded the date upon which the underlying contract could be satisfied; the *Kerr* court made no similar findings.

Because we are unable to determine whether *Kerr* correctly states Texas state law, and if it does, how that decision affects the issues here presented, we believe it necessary to certify to the Supreme Court of Texas the following question:

> When a standby letter of credit, issued in good faith, contains an expiry date that precedes the date by which complete performance of the underlying contract might take place, and all parties agree specifically to that expiry date, when does the obligation of the issuing bank to honor its letter of credit terminate under Texas state law?

We disclaim any intention or desire that the Supreme Court of the State of Texas confine its reply to the precise form or scope of the question certified.

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12 *Kerr*, 753 S.W.2d at 183.

We direct counsel for the parties to confer as soon as practical and, within 15 days, to submit to this court a proposed agreed statement of the case and an agreed phrasing of the question or questions to be certified.[13] If the parties are unable to agree on either the statement of the case or the questions to be certified, the appellant will prepare a proposed statement of each, within 15 days, and within seven days thereafter, the appellee will prepare and file with this court its proposed objections and suggested changes to the appellant's suggestions.

GARZA, *Circuit Judge*, dissenting from the need to certify a question to the Supreme Court of Texas.

In my original dissent from the panel opinion I stated my conviction that the Texas District Court Judge had correctly applied Texas law. Subsequent to the original panel decision, the Texas Court of Appeals in Amarillo published *Kerr Construction Co. v. Plains National Bank*, cited at 753 S.W.2d 181 (Tex.App.—Amarillo, 1987, writ denied), a case that is virtually indistinguishable on the relevant facts from the case sub judice. Apparently the United States Supreme Court is convinced, as am I, that the *Kerr* case sets out the controlling law in Texas regarding the enforcement of letters of credit; that Court has directed us to reconsider our decision in *Exxon v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987) in light of *Kerr*.

Nevertheless, my brothers from Louisiana and Mississippi continue to resist the application of controlling Texas precedent; they have proposed to certify the question presented in the case to the Supreme Court of Texas. Because I find such a certification unnecessary as well as contrary to the purposes behind the proper use of certification, I must once again dissent.

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13 *See West v. Caterpillar Tractor Company, Inc.*, 504 F.2d 967 (5th Cir. 1974); *Allen v. Estate of Carman*, 446 F.2d 1276 (5th Cir. 1971).

I would not bother the honorable members of the Supreme Court of Texas with certification of a question that has already been clearly answered by the Texas Court of Appeals at Amarillo. This is especially true since the Texas Supreme Court denied writ in the very case that answered the question presented for certification.[1]

The majority's decision to certify the question in this case places the Supreme Court of Texas in the position of having to distinguish the facts in the *Kerr* case from those in the case at bar. The task of distinguishing the facts in a case properly before us with the facts of every other case brought to our attention by the parties is *our* responsibility, not that of the Supreme Court of Texas. There is no principled distinction between the *Kerr* case and the case sub judice. But even if there were, it would constitute a misuse of the certification process to ask the Supreme Court of Texas to do for us what we should be doing for ourselves.

My colleagues continue to focus their attention on the expiry date of the letter of credit instead of focusing on the contract, the performance of which was to be guaranteed by the letter of credit.

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1 Another, related, reason to resist the use of certification under these circumstances is the unnecessary delay that it causes in the resolution of a relatively simple case involving the enforcement of a letter of credit. The events giving rise to the cause of action here took place nearly nine years ago. The words of Justice Hale, of the Supreme Court of Washington, are particularly appropos to this case:

> If there ever was a way in which to delay a case as it moves slowly through the court, in my opinion, it would be the very procedure whereby at one stage the case comes to a halt in the federal system, moves over into the state system to await docketing, briefing, hearing, writing, filing of the opinion and petition for rehearing and then moves back into the system of origin to take its place on the judicial conveyor for resumption of proceedings in the federal system.

*In re Elliot*, 446 P.2d 347, 371, 74 Wash.2d 600 (1968) (Hale, J., dissenting).

Considerations of judicial economy and the swift resolution of claims counsel against cavalier resort to the certification procedure even where there is some doubt as to the application of local law. But where controlling law in the jurisdiction of venue is clearly set out in the official reporters of that state, then certification should not merely be exercised with caution—it should not be exercised at all.

I therefore dissent from the certification to the Supreme Court of Texas on the question presented in this case.

I attach to this dissent from the certification of the question as Exhibit A, the proposed opinion which I prepared upon the remand by the Supreme Court of the United States as a proper disposition of the case which my colleagues have rejected in favor of certification.

I have decided to present my Exhibit A to this dissent with the sole purpose of providing for the Supreme Court of Texas consideration of yet one more Texas judge's exposition regarding the controlling law in Texas on the question involved. I do not wish to imply in any manner what the honorable members of the Supreme Court of Texas should do with the certification by our court. I just wanted to make available to the honorable members of the Supreme Court of Texas my personal views from the prior proceedings in our court regarding the proposed disposition of the question presented.

## EXHIBIT A

GARZA, Circuit Judge:

On remand from the United States Supreme Court, we have been directed to reconsider *Exxon Co. v. Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987) ("*Paribas I*") in light of *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied). We conclude that the panel decision in *Paribas I* is in irreconcilable conflict with controlling Texas law as set out in the *Kerr Construction* case. For this reason, we withdraw our previous decision in *Paribas I* and affirm the decision of the U.S. District Court for the Southern District of Texas.

The facts in this case are fully set out in our prior panel opinion at 828 F.2d 1121, 1122-24. For the purpose of our reconsideration, it will be necessary to discuss several salient aspects of the underlying dispute.

In July 1981, Exxon Company contracted to deliver 558,000 barrels of crude oil to Houston Oil & Refining, Inc. in return for the delivery of an equal quantity of crude oil by Houston to Exxon "during September through December 1981." The contract required Houston to provide an irrevocable standby letter of credit to cover the value of the oil delivered by Exxon.

Houston then applied to the Banque de Paris et des Pays-Bas ("Paribas") for a letter of credit in the amount of $19,530,000. As originally noted by the district court, two provisions of the letter of credit clash. The bank's obligation to pay Exxon arises, by the terms of the letter, upon the certification by Exxon that Houston failed to deliver the required volume of crude oil during the period between September and December 1981. The expiry date of the letter, however, requires that certification of non-delivery be made by October 31, 1981. Exxon learned in November that Houston was going to default. It presented certification of the default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected the certifications as untimely.

The district court found first that letters of credit under Texas law are subject to the same rules of construction that apply to ordinary contracts. It then ruled that "[a] construction in favor of Exxon is required by the rule that contracts must be construed to render performance possible." It found that the inconsistencies between the two provisions in the letter of credit rendered performance impossible. Had Exxon made a claim against the letter of credit before the expiry date of October 31, 1981, Paribas would have rejected it because Houston still had the months of November and December to deliver the required volume of crude. Yet, when Exxon presented a claim against the letter of credit after the expiry date, Paribas rejected it as untimely. Thus, from Exxon's perspective, the letter of credit was a nullity; performance was impossible. The district court therefore granted summary judgment in favor of Exxon.

On appeal, a majority reversed. We found that the need for a stipulated expiry date is "particularly acute when a

standby letter of credit is issued." *Paribas I*, 828 F.2d at 1125. We also found that Exxon should simply have rejected the letter of credit and refused to deliver the oil to Houston if it found the inconsistencies between the certification provision and the presentment clause unsatisfactory. Placing "paramount importance" upon certainty of result and practicality of performance, the majority held that the Paribas letter of credit "required no construction and that it terminated on its express expiry date." *Id.* at 1126. Upon reconsideration, we find that this ruling conflicts with the recent decision of the Court of Appeals of Texas in *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App.—Amarillo 1987).[1]

In the *Kerr Construction* case, as in the case at bar, an irrevocable letter of credit was issued in which the certification provision conflicted with the expiration date. The bank in *Kerr Construction* had issued a letter of credit on September 17, 1984, which secured the obligation of one Cary L. Johnson to pay for certain paving work to be completed by Kerr Construction Company. The city of Lubbock, Texas was the beneficiary of the letter. The certification provision provided that the city's draft would be honored when accompanied by a signed statement from the mayor of Lubbock "that the contractor Kerr Construction Company has defaulted or failed within ten (10) months to complete" the required paving improvements. Thus, the bank's obligation to pay would arise ten months after the issuance date of the letter. That date was July 17, 1985. The ultimate expiration date of the letter of credit was July 1, 1985.

Kerr partially completed the paving job when Johnson began defaulting on payment. Kerr accordingly halted work on the project with the balance of the contract remaining unperformed. On July 17, 1985, the city drafted on the bank

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1 When the *Kerr Construction* case was first brought to our attention, it was an unpublished opinion of the Court of Appeals of Texas. Rule 90(i) of the Texas Rules of Appellate Procedure states: "Unpublished opinions shall not be cited as authority by counsel or by a court." *Kerr Construction* has since been published and we are now bound to apply it in the case before us.

to pay the amount guaranteed in the letter of credit. The bank rejected the city's presentment as untimely since the stipulated expiration date had passed on July 1, 1985. Kerr Construction Company and the city sued to collect on the letter of credit. In its opinion, the Texas Court of Appeals stated that the single issue raised by the case was the due date of the letter of credit. It then proceeded to resolve the issue by construction of the document.

The court first noted that the certification clause "states the condition precedent to the Bank's liability and, as such, is the most significant and essential provision in the agreement." *Kerr Construction*, 753 S.W.2d at 184. It stated: "In the absence of a default or failure by Kerr Construction Company to complete the paving improvements within ten months from 17 September, 1984, there is no liability on the Bank." *Id.* The court then observed the rule, well-settled under Texas law, that "when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration." *Id.* [citations omitted]. In addition, the court noted the rule that "where there is an irreconcilable conflict between clauses or provisions in the contract, the expression in the clause or provision first appearing will control." *Id.* Under both rules, the court found the certification clause, rather than the expiration date, controlling as to the due date of the letter of credit. It awarded Kerr Construction Company and the City of Lubbock the amount guaranteed by the letter of credit, pre- and post-judgment interest, as well as attorneys fees.

The *Kerr Construction* case is directly on point. In the case before us, as in *Kerr*, the expiration of the letter of credit predates the occurrence of the conditions precedent to the bank's liability. In both cases, the certification clause is "the provision which contributes most essentially to the agreement." Likewise, in both cases, the certification provision is the expression that first appears in the document. Thus, in the case at bar, as in the *Kerr Construction* case, "the time stated in the [certification clause] prevails over the time stated in the [presentment clause.]" *Id.*

Accordingly, we withdraw our previous panel opinion in this case and AFFIRM the original district court decision. Exxon is entitled to judgment in the amount of $19,530,000. We remand to the district court for calculation of pre-judgment interest from January 1, 1982, post-judgment interest, court costs, the costs of this appeal and attorneys' fees, if any, all of which are to be taxed against appellee Banque de Paris et des Pays-Bas.

**Appendix E**

SUPREME COURT OF THE UNITED STATES

No. 87-1467.

Exxon Company, U.S.A.,

Petitioner

v.

Banque de Paris et des Pays-Bas.

Former decision, 108 S.Ct. 1572.

Case below, 828 F.2d 1121; 835 F.2d 1433.

Oct. 31, 1988. Judgment is vacated and case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Kerr Construction Co. v. Plains National Bank*, 753 S.W.2d 181 (Tex.App.—Amarillo 1987, writ denied).

**Appendix F**

SUPREME COURT OF THE UNITED STATES

No. 87-1467.

Exxon Company, U.S.A.,

Petitioner

v.

Banque de Paris et des Pays-Bas.

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Case below, 828 F.2d 1121; 835 F.2d 1433.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

April 25, 1988. Granted.

## Appendix G

EXXON COMPANY, U.S.A., A DIVISION OF EXXON CORPORATION,

Plaintiff-Appellee Cross-Appellant,

v.

BANQUE de PARIS et des PAYS-BAS,

Defendant-Appellant Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1987.

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Standby letters of credit are issued by banks to assure the prompt payment of money to a party to another contract in the event that the other contract is not performed in accordance with its terms. The issuing bank is required to make payment only if it is presented with specified documents. The function of letters of credit requires that they be succinct and clear, for their utility lies in the assurance they provide that payment will be made on the specified terms without delay or litigation.

In this action for the wrongful dishonor of a letter of credit on which payment was demanded after the stated expiry date of the credit, we find that the obligation of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date. We therefore reverse the district court judgment holding the bank liable.

I.

In July 1981, Houston Oil & Refining, Inc. entered into a contract with Exxon Company, U.S.A., under which Exxon would deliver 558,000 barrels of crude oil to Houston in July and Houston would deliver an equal quantity of crude oil to Exxon "*during* September through December 1981." Exxon made this trade because it had closed part of one of its refineries for maintenance and therefore had a surplus of crude oil. The contract required Houston to provide an irrevocable standby letter of credit to cover the value of the oil delivered by Exxon. It stated that the letter of credit was to be payable to Exxon "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more."

Houston then applied to Banque de Paris et des Pays-Bas, also known as Paribas, for a letter of credit in the amount of $19,530,000. In its application, Houston stated that the letter of credit was to be payable upon presentation of specified invoices; pipeline tickets or transfer statements; and a

> [s]tatement signed by an authorized representative certifying that Houston Oil & Refining, Inc. *has failed to deliver* to Exxon Company, U.S.A. 558,000 barrels of one of the following: South Louisiana to St. James, La., West Texas Sour to Shell, McCamey or Exxon, Crane, Arab Light to U.S. Gulf Coast or Alaskan North Slope to U.S. Gulf Coast *between September and December, 1981.*[1]

The application also expressly requested that the letter of credit expire on October 31, 1981.

Because the transaction was in effect an extension of credit to Houston, Paribas required Houston to provide security sufficient to cover the amount of the credit, and, as part of the security arrangement, the bank blocked certain funds coming into Houston's account. In addition, Paribas charged Houston a fee of $53,000 for establishing the credit.

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1 Emphasis added.

On July 16, 1981, Paribas "opened" the credit by telex and delivered a copy of it to Exxon as requested by Houston. The credit stated that it was to be paid against the documents specified in the application, and that these documents "must be presented not later than October 31, 1981." Because October 31 would be a Saturday, the documents could also be presented on the next business day, Monday, November 2.[2] The credit also stated that it was subject to the 1974 revision of the Uniform Customs & Practice for Documentary Credits, a set of rules promulgated by the International Chamber of Commerce.[3]

Because the letter expired *on October 31*, yet covered deliveries *between September and December*, Paribas checked with Houston twice—both before and after issuing the letter—to make sure that the terms specified by Houston in its application were indeed what it had intended. Before the letter was issued, Flozella Telfair, the Paribas employee who dealt with the application, noted the apparent inconsistency and communicated with Houston. Upon receiving Houston's affirmation that the terms were correct, Telfair drew circles on the application around both the October 31 expiration date and the September-December period specified for delivery, and next to these terms made the notation "OK as per HOR and R.P." (HOR was Houston, and R.P. was Rene Perdreaux, a Paribas lending officer responsible for the Houston account.) Subsequently, after the letter had been issued, Hal Peist, a letter of credit professional at Paribas, discussed its terms with Robert Wheelock at Houston and asked whether a change in the expiration date was desired. Wheelock responded negatively.

When the credit was opened, Paribas sent a copy of the letter to the attention of Don Meiers, the Exxon employee

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2 Tex.Bus. & Com.Code Ann. § 3.503(c) (Vernon 1968); Uniform Customs & Practice for Documentary Credits art. 39, para. a, Int'l Chamber of Commerce Pub. No. 290 (1974 rev), *reprinted in* H. Harfield, *Letters of Credit* 135, 154 (1979).

3 International Chamber of Commerce Pub. No. 290, *reprinted in* H. Harfield, *Letters of Credit* 135 (1979) [hereinafter cited as *Uniform Customs*].

responsible for receiving and transmitting letters of credit and monitoring their expiration dates. Meiers received the letter of credit and transmitted it to the appropriate executives at Exxon with a letter stating that it "is due to expire October 31, 1981." Meiers' transmittal letter also noted that the credit covered the delivery of crude oil by Exxon during July and "the return" of the crude by Houston "between September and December 1981." No one at Exxon complained or even suggested that these terms were not fully satisfactory.

Exxon was an experienced trader of crude oil. It commonly balanced its crude oil supply by entering into exchanges and, unless it was dealing with a major oil company, secured those exchanges by receiving letters of credit issued in its favor. Exxon knew from its experience that it could insist on the amendment of unsatisfactory letters of credit, and it followed the practice of delaying the delivery of crude oil to its trading partners until it had actually received a satisfactory letter.

Houston made no delivery of crude oil to Exxon during September or October of 1981. Before October 31, Meiers brought the problem of Exxon's exposure to loss under the exchange contract to the attention of higher management at Exxon. Exxon asked Houston to obtain an extension of the letter of credit, but did not communicate with Paribas. On October 30, Joe Imparato, the president of Houston and a former Exxon employee, said that he would extend the letter of credit on Monday, November 2; however, he did not do so. When Imparato visited Exxon during the week of November 2, he stated that Houston would not be able to return the crude oil under the contract, and asked whether Exxon would be willing to convert Houston's obligation into a long term debt. Exxon's representatives told Imparato that such an arrangement would be unsatisfactory, and that they would insist on performance as required by the contract.

During November, Paribas released both the security that it had held for its extension of credit to Houston and the funds that it had blocked in Houston's account. Subsequently, on November 30 and on December 1, Exxon attempted to obtain payment by presenting documents to Paribas. Paribas rejected both presentations as untimely.

II.

The district court found a "clash" between the expiry date in the letter and the dates specified for performance of the underlying contract. It held, however, that the letter of credit was not ambiguous because its meaning could be made certain "by application of the rules of [contract] construction." The court resolved the "inconsistency" in part by interpreting the letter of credit against its author, the bank—a rule of construction that generally applies only to clarify ambiguity[4]—and by reading the letter in such fashion as to make performance possible. The court thus construed the contract "in favor of Exxon" and, extending but not defining the expiry date, entered summary judgment in Exxon's favor.

III.

A letter of credit "means an engagement by a bank . . . made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit."[5] The purpose of a standby letter is to insure that one or more parties to a contract will perform their duties under it.[6] The credit substitutes a known, accessible, and demonstrably impeccable source of funds in the event of default by the party whose performance it guarantees. Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, consistency in interpretation across jurisdictional boundaries, and swiftness in execution. By

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4 *See Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154, 156 (5th Cir. 1982); *Chevron Oil Co. v. E.D. Walton Constr. Co.*, 517 F.2d 1119, 1122 (5th Cir. 1975).

5 Tex.Bus. & Com.Code Ann. § 5.103(a)(1) (Vernon 1968).

6 *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979).

eliminating credit risks, they reduce the cost of commercial transactions.

The transaction involves three separate contracts: The first one is the underlying commercial contract between two parties, one of whom will later apply to a bank for the letter, and the other of whom will be the beneficiary of the letter. The terms of this contract may not become known to the bank. The second contract is between the issuer of the letter of credit—typically a commercial bank—and its customer, who in applying for the letter asks the bank to draft the letter in conformance with specified terms. The third contract, the letter of credit itself, is between the issuer and the beneficiary.[7] The issuer unconditionally and irrevocably binds itself to pay a specified sum upon presentation of documents complying with the terms of the credit. The issuer's obligation to pay the beneficiary is generally independent of any obligation of the issuer's customer to the beneficiary,[8] and the issuer has no obligation to pay unless the beneficiary strictly complies with the conditions contained in the credit.[9] An issuer who makes payment upon a presentation that does not conform to the requirements of the credit loses its right to repayment from its customers.[10]

A letter of credit is therefore strictly construed.[11] The issuer is required to act in good faith and to observe any general banking usage, but is not charged with responsibility for knowledge or lack of knowledge of any usage of the trade in

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7 *See East Girard Sav. Ass'n*, 593 F.2d at 601; *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 422 (5th Cir. 1971), *cert. denied*, 406 U.S. 919, 92 S. Ct. 1771, 32 L.Ed.2d 118 (1972); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 112 (Tex. 1978).

8 J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 711-12 (2d ed. 1971).

9 *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 464-65 (2d Cir. 1970); *see also Republic Nat'l Bank*, 578 S.W.2d at 114-15.

10 *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983).

11 H. Harfield, *supra*, at 36.

which the customer and beneficiary are involved.[12] It must determine whether to make payment to the beneficiary "on the basis of the documents [presented to it] alone."[13]

A half century ago, when a particular letter of credit did not specify an expiration date, courts required that necessary documents be presented to the issuing bank "within a reasonable time."[14] Eventually, that formulation proved to be commercially unsatisfactory because it left a bank's obligation uncertain and open-ended. To solve this problem, the International Chamber of Commerce adopted the Uniform Customs & Practice for Documentary Credits. Article 37 of the *Uniform Customs* requires all letters of credit made subject to it to stipulate an expiry date. Paribas' letter of credit expressly incorporated by reference the *Uniform Customs*, and therefore by necessity stated a specific termination date.

The need for a precise expiration date is particularly acute when a standby letter of credit is issued. Although such a credit is different from a surety bond or a guaranty, it does assure payment in the event the account party fails to perform an underlying contract with the beneficiary, the terms of which may be unknown to the issuer. The standby credit is therefore an extension of a bank's credit to its customer and, for this reason, it is subject to the statutory and regulatory loan limits imposed upon lending institutions.[15] Because the issuer of a standby credit does not hold documents representing goods in a commercial transaction, it cannot look to those documents as security for repayment by its customer.[16] Therefore, the issuer must look solely to the financial strength of its customer and to whatever security it has required for issuance of the credit. The length of time that

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12 Tex.Bus. & Com.Code Ann. § 5.109(a), (a)(3) (Vernon 1968).

13 *Uniform Customs* art. 8, para. c.

14 *See Lamborn v. Nat'l Park Bank*, 240 N.Y. 520, 148 N.E. 664, 666 (1925).

15 *Republic Nat'l Bank*, 578 S.W.2d at 114.

16 *See Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F.Supp. 386, 393-94 (D.Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983).

an issuer remains liable for a failure to perform by its customer is obviously a matter of critical importance to the issuing bank, to the customer who must pay for the credit, and to the regulatory authorities that monitor the bank's activities.[17] Good banking practice and common sense require that the bank's liability terminate at a date certain.

IV.

The issue before us is not the clarification of a contract susceptible to more than one interpretation. The expiry date in the letter of credit is as certain as words permit. The requirement in the letter that Exxon certify, no later than October 31, 1981, that Houston "has failed to deliver . . . between September and December, 1981" created no uncertainty on the face of the letter as to its expiration date.[18]

Counsel for both sides have stated that the phrasing of the required certification, that Houston "*has failed* to deliver" the crude oil, excludes the possibility of presentation before the end of the stated delivery period. If that were indeed Exxon's understanding, then it should have refused the letter when tendered. The terms of the credit departed in more than one respect from the Exxon-Houston contract. As we have noted, that contract provided that the credit was to be payable "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more," and also provided that deliveries were to be made *during* September through December. Houston instead applied to Paribas for a letter of credit requiring a statement "by an authorized representative certifying that Houston . . . has failed to deliver . . . between September and December." If either these discrepancies or the expiry date did not satisfy Exxon, it simply should have declined to accept the credit and refused to deliver oil to Houston.

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17 *See* J. Dolan, *The Law of Letters of Credit* ¶ 5.03[3][e] (1984).

18 *Cf. Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955); *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713, 715 (Tex.Ct.App. 1986, no writ).

Exxon's decision to deliver suggests the possibility that, as contended by counsel for Paribas, Exxon was relying at least in part in its business dealings with Houston and its relationship with Imparato, a former crude oil trader at Exxon.

Exxon does not suggest that Paribas acted fraudulently. Nor does Exxon allege that Houston specified the expiration date of October 31 as the result of inadvertence or mistake, or that Exxon was mistaken as to that date when it accepted the letter. Indeed, the evidence shows that Exxon employees noted the expiry date upon their receipt of the letter of credit and that in late October Exxon asked Houston to obtain an extension of the expiry date.

Exxon does assert that Paribas did not act in "good faith" toward Exxon when it issued a letter of credit that its employees had questioned as "not mak[ing] sense" when Paribas knew that the letter was designed to secure Houston's contractual obligations to Exxon. No authority has been cited to us, and we have found none, that imposes on an issuer a duty to the beneficiary to "make sense" of the customer's application. As provided by Tex.Bus. & Com.Code Ann. § 5.109(a), Paribas did owe a duty of good faith to Houston, its customer. Tex.Bus. & Com.Code Ann. § 1.201(19) defines the standard of "good faith" as "honesty in fact in the conduct or transaction concerned." As mentioned earlier, Paribas checked with Houston both before and after issuing the letter to make sure that the terms specified in the application were what Houston intended. Thus, Paribas acted honestly toward Houston. Paribas' acceptance of Houston's assurances could not indicate dishonesty toward Exxon, for the expiration date was apparent on the letter when Paribas delivered it to Exxon. Paribas could tell Exxon no more than what was on the face of the letter, and Paribas knew that Exxon could insist on amendments to the letter if it was not satisfied. Moreover, as already noted, Exxon has not alleged fraud against the bank or Houston. Paribas therefore complied entirely with the terms of the letter when it interpreted the credit as having expired on November 2 and released its security to Houston.

As a lawyer experienced in letter of credit transactions has written, cautioning issuers, "the legality of a letter-of-credit transaction should not be equated with its prudence or commercial sense."[19] In like measure, the issuer is not charged with determining the utility to, or prudence of, a beneficiary who acts in reliance on its letter of credit. In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that Paribas established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

We therefore hold that the letter of credit issued by Paribas required no construction and that it terminated on its express expiry date. The summary judgment is REVERSED and judgment is entered for Paribas.

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GARZA, Circuit Judge, dissenting.

I respectfully dissent.

The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.

I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil and Refinery, Inc. still had the months of November and December to return to Exxon the oil that they had received under the original contract between Houston Oil and Refining, Inc. and Exxon.

I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was

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19 Harfield, *Code, Customs & Conscience in Letter-of-Credit Law*, 4 U.C.C.L.J. 7, 14 (1971).

correct. I would affirm the granting of summary judgment to Exxon on the basis of his memorandum opinion of September 17, 1986, which is attached as Appendix A to this dissent.

## APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON COMPANY, U.S.A.,
*Plaintiff*,

vs.

BANQUE DE PARIS ET DES PAYS-BAS,
*Defendant*.

Civil Action No. H-82-3481

### MEMORANDUM

This action requires the construction of a letter of credit (letter) issued by the Banque de Paris et des Pay-Bas (Paribas) for the benefit of Exxon Company, U.S.A., (Exxon) to secure an obligation of Houston Oil and Refining, Inc. (HORI). The parties have filed cross-motions for summary judgment. The court will grant Exxon's motion and deny Paribas's motion.

On July 9, 1981, Exxon and HORI entered into an oil exchange agreement (agreement). Exxon, finding that it had a temporary surplus of crude oil at its Baton Rouge refinery, contracted to ship HORI approximately 558,000 barrels of crude in July 1981, and HORI agreed to deliver the same amount of crude to Exxon during September through December, 1981. The agreement required HORI to secure its obliga-

tion by a letter of credit in favor of Exxon for $19,530,000. On HORI's application, Paribas, for a fee of approximately $50,000, issued the letter on July 16, 1981.

Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that HORI failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. Exxon learned sometime in November that HORI was going to default. It presented the certification of HORI's default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely.

Exxon wants its money.

*Making Sense of the Letter of Credit.*

In the State of Texas letters of credit are subject to the same rules of construction that apply to ordinary contracts. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 115 (Tex. 1978). The question of ambiguity in a contract is one of law. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983); *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.* 596, S.W.2d 517, 518 (Tex. 1980). A contract is ambiguous only where its meaning remains uncertain after application of the rules of construction. The letter is not ambiguous.

*Against the Drafter.*

Inconsistencies must be resolved against the party who drew the contract. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. This rule seems especially compelling here. Deposition testimony shows that shortly after the letter was issued a Paribas employee noticed the inconsistency and discussed it with HORI. Paribas never sought to amend the letter to remove the contradiction or to notify Exxon.

*Possibility of Performance.*

A construction in favor of Exxon is required by the rule that contracts must be construed to render performance possible. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. Obviously Exxon could not have certified on October 31 that HORI had not delivered through the end of the following two months. Paribas argues that practices in the industry were such that in the normal course of things Exxon should have known by October 31 that HORI would default. Assuming that to be the case, it does not follow that Exxon was bound to make presentment by October 31. The presentment provision required Exxon to certify that HORI had defaulted, not that it probably would. It is difficult to believe that Paribas would have cheerfully paid $19,000,000 to Exxon for a default that had not yet taken place.

*BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex.App.—Dallas 1986, no writ), supports Exxon's position. In that case the court construed a letter of guaranty that required Hynuteck to certify by December 31 that certain payments were more than twenty-five days past due. A payment fell due on December 31, and Hynucek made demand upon the guarantor at the end of January.

Ignoring the dictum about the letters of credit generally, the court in *BA Commercial* identified and applied the rules of construction that resolve this case.

> [A] fair reading of the guaranty shows that such an interpretation would defeat the express intent of the parties.
>
> * * * * * *
>
> [R]equiring that 25 days notice be given by December 31, 1983, would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties.

*BA Commercial*, 705 S.W.2d at 716. The word "purpose" could be well substituted for "intent" in those two passages.

*Exxon Could Have Lied.*

Paribas, becoming disingenuous, maintains that there was nothing to stop Exxon from certifying by October 31 that HORI had defaulted, although a default had not occurred until mid-November. Paribas purports to have understood the certification simply as "a statement . . . allowing Exxon to recover the proceeds of the letter of credit at any time during the specified period that it believed itself to be at risk in the transaction." (Paribas's January 1986 memorandum of law, p. 15). The court rejects this interpretation of certification for three reasons. First, it strains the court's credulity to believe that Paribas would or should have paid on Exxon's representation that it was merely feeling insecure about HORI's future performance. HORI would have sued Paribas. Second, it is difficult to understand the reason for the requirement of certification if something less than an actual default were enough to trigger payment. One certifies the truth of specific, verifiable facts, not one's fears as to future performance. Had Paribas received a certification from Exxon of an unequivocal announcement of impending default by HORI, Paribas might have accepted it as an anticipatory breach or repudiation, but the facts do not give rise to that argument. Third and most important, where the plain wording of a letter of credit requires a party to certify the past occurrence of specific events, it is inimical to maintain that the actual truth of the certification is of no importance.

*Election of Remedies.*

Paribas also argues that Exxon cannot recover because Exxon has made an election of remedies. The basis of this claim is that, after failing to obtain payment from Paribas, Exxon in January 1982 entered into an agreement with HORI (1982 agreement). The purpose of this agreement was to rescue HORI's indebtedness to Exxon, both under the agreement that the letter was issued to cover and under another oil exchange agreement on which HORI had defaulted. In October 1982 HORI defaulted on the 1982 agreement. Exxon filed suit against it, and Paribas argues that in so doing Exxon

foreclosed its option to sue Paribas. The court does not agree.

Election of remedies is defined in Texas as "the act of choosing between two or more inconsistent but co-existent modes of procedure and relief allowed by law on the same set of facts." *Custom Leasing, Inc. v. Texas Bank & Trust*, 491 S.W.2d 869, 871 (Tex. 1973). The classic example of election of remedies involves a plaintiff's choice between two remedies that may be imposed on the same defendant, as between specific performance and damages in a contract case, or between negligence and intentional injury in a tort action. *Seegers v. Spradley*, 522 S.W.2d 951 (Tex.Civ.App.—Beaumont 1975), writ ref'd n.r.e.); *Fulmer v. Rider*, 635 S.W.2d 875 (Tex.App.—Tyler 1982, writ ref'd n.r.e.). Here, by contrast, Exxon is proceeding under what are really two distinct contracts with two distinct obligors: the letter and the 1982 agreement with HORI.

*Accord or Novation.*

Similar to the election claim, Paribas argues that the 1982 agreement constituted either an accord and satisfaction or a novation. Neither claim is tenable. There is no indication that there was an agreement express or implied, between Exxon and HORI that Paribas would be released from its responsibility. That intention to release Paribas must have been embodied in their agreement for an accord and satisfaction to exist to Paribas's benefit. *E.g.*, *San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 640 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). There is also no novation between Paribas and Exxon since Paribas and Exxon did not reach any agreement. *See Dodson v. Sizenbach*, 663 S.W.2d 13, 16 (Tex.App.—Houston [14th Dist.] 1983, no writ); *Villarreal v. Laredo Nat'l Bank*, 677 S.W.2d 600, 607 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.).

If HORI had performed the 1982 agreement and if Paribas had then paid Exxon, HORI may have been entitled to recover the payment from Exxon. That did not happen.

*Conclusion.*

A judgment will be entered in favor of Exxon for $19,530,000, pre-judgment interest at 6% from January 1, 1982, post-judgment interest, and costs of court, leaving attorneys' fees the only issue to be decided.

Signed on September 17, 1986, at Houston, Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

## Appendix H

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

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Appeal from the United States District Court
for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12-08-89, 5 Cir., 198_, ____ F.2d ____)
(April 13, 1990)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

## Appendix I

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10-08-87, 5 Cir., 198_, ____ F.2d ____)
(December 8, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

**Appendix J**

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

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Appeal from the United States District Court
for the Southern District of Texas

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[Filed Feb. 12, 1988]

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ORDER:

The motion of Appellee, Exxon Corporation, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED, because, inter alia, Rule 90(i) of the Texas Rules of Appellate Procedure states:

> Unpublished opinions shall not be cited as authority by counsel or by the court.

/s/ [Illegible]
United States Circuit Judge

## Appendix K

EXXON COMPANY, U.S.A., a DIVISION
OF EXXON CORPORATION,

Plaintiff-Appellee, Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,

Defendant-Appellant, Cross-Appellee.

No. 87-2007.

United States Court of Appeals,
Fifth Circuit.

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Appeals from the United States District Court
for the Southern District of Texas

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[Filed Feb. 12, 1988]

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ORDER:

The motion of Appellee, Exxon Corporation, for leave to file a second suggestion for rehearing en banc is DENIED.

/s/ [Illegible]
United States Circuit Judge

## Appendix L

SUPREME COURT OF THE UNITED STATES

No. A-570.

Banque de Paris et des Pays-Bas,

Petitioner

v.

Exxon Company, U.S.A.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including
May 7, 1990.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 30th
day of March, 1990.

**Appendix M**

SUPREME COURT OF THE UNITED STATES

No. A-570.

Banque de Paris et des Pays-Bas,

Petitioner

v.

Exxon Company, U.S.A.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including
April 9, 1990.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of February, 1990.

## Appendix N

### Rule 29.1 Listing

Parent, Principal Affiliates and Non-Wholly-Owned Subsidiaries of
BANQUE PARIBAS
(formerly called Banque de Paris et des Pays-Bas)

*Parent*:

Compagnie Financiere de Paribas

*Principal Affiliates* and Subsidiaries Not Wholly-Owned*:

Banco Amazonas
Banque Paribas
Banque Paribas (Belgique) S.A.
Banque Paribas Cameroun
Banque Paribas Capital Markets, Ltd.
Banque Paribas Cote d'Ivoire
Banque Paribas Deutschland OHG
Banque Paribas du Canada
Banque Paribas Gabon
Banque Paribas Luxembourg S.A.
Banque Paribas Norge
Banque Paribas N.V.
Banque Paribas Pacifique
Banque Paribas Polynesie
Banque Paribas (Suisse) S.A.
Banque Parisienne et Internationale
Banque Petrofigaz
Banque Pouyanne
Banque Sudameris
Bridel Emile
Bureau d'Etudes et de Transactions Immobilieres

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* Excludes companies in which the interest of Compagnie Financiere de Paribas is less than 5% or $1 million.

Caisse Centrale de Reescompte
Campenon Bernard
Cap Groupe PLT
Carbone Lorraine
Cellulose du Rhone et d'Aquitaine
Chiers Chatillon
Cie Holding pour l'Aluminium
"COBEPA"

Main subsidiaries of COBEPA include the following companies:

Groupe 1
Compagnie de Participation Internationale
Compagnie de Participation Internationale (Nouvelle) N.A.
CDI
Compagnie Generale Mosane
Societe Financiere de Developpement et de Participations
Libelux S.A.
Agemar S.A.
Investerings en Beleggings Maatschappij Lacourt
Vlaamse Investerings en Beleggings-Maatschappij
Financial Control International
Groupe Financier Liegios
Regio
Cosylva
Cofim
Sogespar
Courcelles Nord
Sodemeuse
Paribas Realty
Paribas Participations Limitee
Sodepa

Cofimer
Coginvest
Cometra Grands Lacs
Compagnie Auxiliaire d'Enterprises et de Chemins de Fer
Compagnie Bancaire

Main subsidiaries of the Compagnie Bancaire group include the following companies:

Union de Credit pour le Batiment
Compagnie pour la Location d'Equipements Professionels
Union Francaise des Banques "UFB"
Fonciere de la Compagnie Bancaire
Credit a l'Equipement des Menages
Locabail Immobilier
Compagnie Francaise d'Epargne et de Credit
Societe d'Investissements Immobiliers de France
Societe d'Investissements Immobiliers de France Contructions
Comagnie pour le Financement de l'Industrie du Commerce & de l'Agriculture
SICAR
Locabail Energie
Kleber Portefeuille
Cardimo
Sofarim Habitation
Locabail Finance International Ltd.
Compagnie Financiere Kleber
Cardif
Cofibail Auto

Compagnie Bancaire USA Finance Corp.
Compagnie Centrale de Financement
Compagnie de Fives-Lille
Compagnie d'Enterprises Industrielles et Commerciales
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres
Compagnie Financiere de Syrie et du Liban
Compagnie Fonciere
Compagnie Franco-Marocaine
Compagnie Generale de Developpement Immobilier
Compagnie Holding pour l'Aluminium
Compagnie Metallurgique et Miniere
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Espanola

Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Minera
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Norge
Compagnie Luxembourgeoise de Television "CLT"
Conseil Investissement
Corexcal Inc.
Corexland
Courcoux Bouvet
Credit du Nord
Credit du Nord Belge
Credit Naval

Dolisos
Doux Ets
Droust Assurances

Enelfi Bretagne
Erbe S.A.
ETKC
Eurafrep
Eural Spaarkas N.V.
Eurocem, Inc.

Financiere du Caz et de l'Energie
Financiere Gabonaise de Developpement Immobilier
Fougerolle

GB Inno B.M.
Gevaert
Groupe Bruxelles-Lambert
Groupe Credit du Nord

Main Subsidiaries of the Credit du Nord group include the following companies:

Banque Nuger Pierre
Banque Nicolet, Lafanechere et de L'Isere
Union Bancaire du Nord
Banque Tarneaud Freres et Cie
Banque Joire Pajot et Martin
Caisse Generale de Depots et d'Avances

Societe Immobiliere et Financiere d'Investissements et de Coordination
Banque Lenoir et Bernard
Banque Arnaud Gaidan
Sedel
Norbail
Banque de Marches et d'Arbitrage

Historische Gebouwen
HRI Dolisos America

IHC Caland N.V. (and subsidiaries)
Immobiliere Rosiers
Immo-Paribas S.A.
Imosa
Interven
Itag

Knoedler-Modarco

Laiteries Emile Bridel
Lectra Systeme
Logibail

Maneurop
Mestrezat
Multireal S.A.

Nantes Navires Participations
Neficom
Niegeria Merchant Banking Corporation
Nord-Est
Nouvelle Compagnie Financiere pour l'Outre-Mer
Nouvene Cofimer
Novolease S.A.

OCEFI
"ODGH" Omnium de Developpement et de Gestion Holding
Onatra S.A.
Opatra

Pargelux
Paribas Asia Holding
Paribas Asia (1985) Ltd.
Paribas Bank International (Texas) Inc.
Paribas do Brazil
Paribas Europe
Paribas Finance, Inc.
Paribas Finance (Texas), Inc.
Paribas Finanziara Spa
Paribas Group Australia Pty, Ltd.
Paribas International
Paribas Investment Australia
Paribas North America, Inc.

Main subsidiaries of Paribas North America, Inc. include the following companies:

Paribas Corporation
Paribas Technology, Inc.
Paribas Asset Management Incorporated
Paribas Asset Management S.A.
Paribas International Bond Management
Paribas Futures
Paribas Properties

Paribas Participations B.V.
Paribas Paritcipations S.A.
Paribas Securities (Panama) Inc. c/o Arias Fabrega
Paribas South East Asia Ltd.
Paribas Suisse (Bahamas) Limited
Paribas Trust Co.
Paribas U.K. Holding Limited
Paribas U.S.A.
Paribaven
Poliet
Polydev
Prominco Holding

Quilter Goodison

Regie Immobiliere de la Ville de Paris
Robert Lefevre S.A.
Roegiers

SACI
SAGIP
Sait Electronics
Samaf
Soulnes-Chatillon
Scoa
Sedicecom
Segin Nord (Lille)
Sema-Metra
SFEEC
Smurfit Paribas Bank Ltd.
SNBE (Societe Noubvelle de Banque Europe)
Societe Anonyme de Gestion et d'Investissements et de Participations
Societe Anonyme de Transactions Internationales
Societe Auxiliaire de la Construction Immobiliere
Societe de Gestion d'Interets Petroliers
Societe de Participations Camerounaise
Societe de Participations Fincaires et Financieres Paribas "SPB-Paribas"
Societe de Participations Ivoirienne
Societe de Participations Techniques et Financiere
Societe de Recherche et de Financement
Societe des Ciments Francais
Societe d'Etudes Immobilieres et de Constructions
Societe d'Organisation, de Management et de Developpement pour les Industries Alimentaires et Agricoles
Societe Francaise de Sucreries au Chili
Societe Gabonaise de Participations
Societe Generale Commerciale et Financiere
Societe Generale de Financement Intercontinental
Societe Immobiliere Victoire
Societe Metalurgique de Gorcy
Societe Neo-Caledonienne de Developpement et de Participations

Societe Nouvellas Paribas International "SNPI"
Sococal
SOFIREAL
SOGEDIP
Ste Marocaine de Depots et de Credit
Sud Pacifique Miniere

Teleplastics Industries
Texaf Financiere Gestion
Transnucleaire

UFIBA
UGC Belgique
Union Financiere et Bancaire

Valeo
Valeurs et Rendements (Luxembourg)
Valex Petroleum, Inc.
Veninter
Vinton Oil and Gas Company